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No. 98-466

In The

Supreme Court of the United States

October Term, 1998

JEROME MARTIN,

Petitioner,

vs.

KENTUCKY STATE POLICE, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The Commonwealth Of Kentucky

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether this Court lacks jurisdiction as the decision of the Kentucky Supreme Court is premised upon adequate and independent state grounds more than sufficient to support the decision. Alternatively, whether there is no reason to grant certiorari as this Court's ruling in *LaChance v. Erickson*, 118 S.Ct. 753 (1998), is controlling in this case.

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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT FROM THE DECISION OF THE SUPREME COURT OF KENTUCKY

The Respondents, Kentucky State Police, Kentucky State Police Commissioner, Captain John Witt, Captain Lonnie Moert, Lieutenant Jerry Helm, Trooper Stanley Jones, Trooper Joe Allen, and Trooper Mark Cool (hereinafter referred to collectively as Kentucky State Police), respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Kentucky Supreme Court's decision in this case.

OPINIONS BELOW

On January 11, 1991, after hearing evidence for several days an administrative Trial Board returned a unanimous finding that then Kentucky State Police Trooper Jerome Martin had engaged in an act of oral sexual gratification while on duty and further determined that Trooper Martin had subsequently lied about the event when questioned by his supervisors. Consequently, Trooper Martin was found to have violated the administrative rules of conduct relative to Conformance to Law and Dishonesty and was dismissed from the Department of Kentucky State Police. (Trial Board No. 90-2, Transcript of Proceedings (TBT, Vol. I, p. 2; TBT, Vol. VII, p. 131)).

Martin appealed to the Franklin Circuit Court claiming: (1) the Trial Board had exceeded its authority and jurisdiction; (2) the Trial Board was improperly instructed as to the standard of proof for an administrative hearing;

and (3) there was not substantial evidence to support the Board's findings. The Franklin Circuit Court affirmed the Trial Board by order entered February 25, 1994. Martin then appealed to the Kentucky Court of Appeals (Appeal No. 94-CA-000616). The Court of Appeals, relying on *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992) (which, subsequent to the administrative hearing, decriminalized deviate sexual conduct), vacated and remanded the Franklin Circuit Court's Order.

On remand, following submission of the parties' briefs, the Franklin Circuit Court entered an Amended Order on June 15, 1995, vacating the Trial Board's decision as to the charge of Conformance to Law, and affirming the decision as to the charge of Dishonesty. The Franklin Circuit Court found "substantial evidence in the record to support the Trial Board in its decision to dismiss the Petitioner for Dishonesty."

Again, Martin appealed the Franklin Circuit Court's decision, (Appeal No. 95-CA-001628). By Opinion entered December 13, 1996, the Court of Appeals, in a split opinion, reversed the Franklin Circuit Court's affirmance of the Trial Board. The Kentucky State Police timely filed a petition for rehearing and/or modification which was denied by opinion entered January 24, 1997.

On February 16, 1997, the Kentucky State Police filed a motion for discretionary review before the Kentucky Supreme Court. This motion was granted by order entered October 22, 1997. By opinion entered March 19, 1998, the Kentucky Supreme Court reversed the Kentucky Court of Appeals and reinstated the decision of the

Franklin Circuit Court affirming Martin's dismissal by the Trial Board.

On June 18, 1998, the Kentucky Supreme Court entered an order denying Martin's petition for rehearing.

STATEMENT OF THE CASE

On or about May 27, 1990, Doris and John Ray went to the Pinson Cemetery in Pike County to visit the graves of Mr. Ray's parents. Mrs. Ray was forced to exit her vehicle and approach the grave site on foot because then on-duty State Police Trooper Jerome Martin had blocked the road leading thereto with his Kentucky State Police cruiser. (TBT, Vol. II, p. 5). Upon reaching Martin's cruiser, Mrs. Ray observed a uniformed Kentucky State Police trooper, Martin, in the front seat of his issued Kentucky State Police cruiser, slumped down with his uniform pants down to his knees. (TBT, Vol. II, p. 5). Mrs. Ray further observed a second man in the front seat of Martin's state police cruiser leaned across the front seat with his head, face down, between Martin's legs. (TBT, Vol. II, p. 6).

Mrs. Ray informed her son, Terry Thompson, a Kentucky State Police Trooper, of what she had observed. (TBT, Vol. III, p. 59). Trooper Thompson reported the event described by his mother to his supervisors at the Pikeville State Police Post. (TBT, Vol. III, p. 49). Pikeville Post Commander Captain Gary W. Rose instructed Lieutenant Ed Shemelya to conduct an investigation into the allegations against Martin. (TBT, Vol. III, p. 49). After an initial investigation, Lieutenant Shemelya confronted

Martin with the allegation that Martin, while on duty and in uniform in his issued cruiser, had participated in an oral act of sexual gratification with a man identified as Tim Branham. Martin denied that the act of oral sex had taken place. (TBT, Vol. IV, pp. 4-5; TBT, Vol. III, p. 55).

The investigation was concluded and based on the findings therefrom and Martin's subsequent denials, pursuant to Kentucky State Police Policies, administrative charges of Conformance to Law and Dishonesty, both Class A violations, were brought against Martin. (TBT, Vol. I, pp. 6, 7). On December 18, 1990, after a continuance had been requested by Martin and granted, a Trial Board convened to hear the charges. KRS 16.140. The hearing was adjourned on December 21, 1990, pursuant to Martin's request. On January 11, 1991, the Trial Board reconvened and concluded. The Trial Board returned a unanimous finding that Martin had engaged in an act of oral sexual gratification while on duty and further determined that Martin had subsequently lied about the event when questioned by his supervisors. Consequently, Martin was found to have violated the administrative rules of conduct relative to Conformance to Law and Dishonesty and was dismissed from the Department of Kentucky State Police. (TBT, Vol. I, p. 2; TBT, Vol. VII, p. 131).

REASONS FOR DENYING THE PETITION

I. WHETHER THIS COURT LACKS JURISDICTION AS THE DECISION OF THE KENTUCKY SUPREME COURT IS PREMISED UPON ADEQUATE AND INDEPENDENT STATE GROUNDS MORE THAN SUFFICIENT TO SUPPORT ITS DECISION.

If a decision by a state's highest court is based on independent and adequate state grounds, this Court may not assume jurisdiction of the case. *See Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935). A review of the decision of the Kentucky Supreme Court reveals that it is premised upon state grounds, specifically, Kentucky Revised Statutes 16.140 and 16.150. In the courts below, as here, Martin claimed that the Trial Board exceeded its authority and jurisdiction. Martin also claimed, as here, that the findings of the Trial Board were not supported by substantial evidence. As the following discussion reveals, applicable Kentucky law is dispositive of each claim.

A. The Kentucky Supreme Court's determination that the Kentucky State Police Trial Board did not act beyond its authority and jurisdiction is correct and based upon applicable Kentucky law.

Martin's claims that the Kentucky State Police Trial Board exceeded its authority is without merit. In support of this claim, Martin cites to the fatally flawed ruling of the Kentucky Court of Appeals which found that "the underlying conduct and Martin's denial are so intertwined as not to be severable for the purpose of providing alternate grounds for his dismissal." (Opinion Reversing,

p. 4). Consequently, the Kentucky Court of Appeals reasoned that as the underlying conduct is noncriminal, "[a]ny associated or tangential allegations of wrongdoing must fail accordingly." (Opinion Reversing, p. 4). As found by the Kentucky Supreme Court this ruling and any arguments based thereon must be rejected based upon applicable Kentucky law.

In *Louisville Civil Service Board v. Blair*, 711 S.W.2d 181 (Ky. 1986), a police officer was convicted on charges of wanton endangerment and criminal mischief. Subsequent thereto, Blair was dismissed for violation of the agency's administrative rule, "Violation of Any State, Federal, Local Law or Civil Service Rule." Blair's criminal conviction was later reversed and he then appealed his termination for violation of a departmental rule as his criminal conviction was based on the same underlying grounds as the administrative charge. The Kentucky Supreme Court affirmed the officer's dismissal holding, "The ultimate result of the criminal proceedings, whether it be acquittal or reversal or other, is not dispositive of the issues presented in an administrative proceeding." *Id.* at 183. The Kentucky Supreme Court recognized that a "decision in a criminal trial is not res judicata in an administrative proceeding because the parties to the action are different, the rules of evidence are different and a different standard of proof is involved." *Id.* (citation omitted). Reversal of the criminal charges did not establish, as a matter of law, that Blair did not commit the underlying act in question.

In the case at bar, the court of appeals' holding was premised upon the ultimate dismissal of the criminal proceedings against Martin. Clearly, this holding is not

only fundamentally unsound, but it also conflicts with the controlling law of the Commonwealth as espoused by the Kentucky Supreme Court in *Blair*.[1]

Martin was charged with Dishonesty. Dishonesty is a Class A violation pursuant to Department policy. This charge was separate, independent and distinct from the charge of Conformance to Law. The criminality of the event or circumstance about which Martin was questioned is irrelevant with respect to the charge of Dishonesty. As evidenced by its comments, the pertinent issue to the Trial Board was whether Martin had been honest and truthful when questioned. In fact, the Chairman of the

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[1] In *Blair*, the Kentucky Supreme Court noted as persuasive authority the decisions in *City of Gadsden v. Head*, 429 So.2d 1005, 1007 (Ala. 1983) (holding that, "[a]n acquittal in a criminal case is not dispositive of the issues presented in a civil proceeding arising out of the same set of operative facts[,] . . . [as] [b]y definition, an acquittal in a criminal case does not resolve all factual issues, but leaves factual issues doubtful. . . . A judgment of acquittal is only a determination that guilt has not been established beyond a reasonable doubt, although a preponderance of evidence might point thereto.") and *Commissioner, Balt. City Police Dept. v. Cason*, 368 A.2d 1067, 1079 (Md. App. 1977) (holding that, "[w]hile the parties to the criminal and the removal proceedings were the same, the charges, though parallel, were not precisely on all fours and the burden of proof was different – a preponderance . . . in the removal proceeding, beyond a reasonable doubt in the criminal."). Further, in *Goolsby v. Green*, 431 So.2d 955, 959 (Ala. 1983), the Alabama Supreme Court held, "The question of whether Goolsby is entitled to reinstatement turns upon whether Goolsby actually committed the act which constituted the criminal offense. The dismissal of the criminal charge, under the circumstances presented in this case, does not establish, as a matter of law, that Goolsby did not commit the acts in question."

Trial Board stated, "I think the center of everything we're doing has to do with honesty. . . . I think truth is the whole thing that we're looking at." (TBT, Vol. I, p. 83). Consequently, whether the underlying act was criminal or noncriminal is irrelevant. The paramount issue was and remains whether Martin was honest.

As found by the Kentucky Supreme Court, pursuant to KRS 16.080 the Commissioner of the Department of Kentucky State Police is entrusted with the promulgation of rules and regulations for the discipline of its officers. The Kentucky State Police Trial Board is entrusted with exclusive jurisdiction of the discipline and removal of officers pursuant to KRS 16.150(4). The Kentucky State Police and its Trial Board are charged with the duty to ensure that its officers are *"at all times honest and truthful. . . . "* Kentucky State Police Policy & Procedure Manual, AM-E-1, 10 (emphasis added). Consequently, as in this case, if the Department of Kentucky State Police receives a complaint regarding an officer's behavior, and throughout the subsequent investigation thereof the officer is dishonest, that officer will be charged with Dishonesty regardless of whether the underlying conduct is criminal or noncriminal. The central issue is the officer's honesty and truthfulness.

The Kentucky Court of Appeals' holding that the separate charge of Dishonesty does not provide an independent ground for Martin's dismissal was based on the following premise: "The coordinating, secondary charge of dishonesty arose directly from his assertion of a defense: *i.e.*, that he had not engaged in the conduct constituting sodomy." (Opinion Reversing, p. 4). As found by the Kentucky Supreme Court, this premise is

fatally flawed and the holding based thereon is equally defective. Whenever an officer charged with violation of the Department's rules and regulations untruthfully claims that he has not engaged in the violative conduct, be it criminal or noncriminal, he will be asserting the defense that he did not "engage in the conduct constituting" the violation. Thus, pursuant to Martin's argument, Dishonesty would no longer be a viable charge. Kentucky State Police officers would be able to engage in untruthful conduct with impunity. This would undermine the very foundation of just law enforcement.

The Trial Board, pursuant to the authority vested by KRS 16.140, listened to the testimony and other evidence and determined, based upon the statutorily prescribed standard of proof, that throughout the investigation of Martin's on duty behavior, Martin was at all times dishonest and untruthful. Dishonesty is a Class A violation punishable by termination of employment if the Trial Board determines that such is appropriate. Here, as found by the Kentucky Supreme Court, the Trial Board, acting within its scope and authority, determined the proper punishment for Martin's dishonesty was dismissal. Based on the foregoing, the Kentucky State Police respectfully submits that the decision of the Kentucky Supreme Court is fundamentally sound and correct and based upon applicable Kentucky law.

B. The Kentucky Supreme Court's determination that the Trial Board's findings were supported by substantial evidence is correct and based upon applicable Kentucky law.

The Kentucky Supreme Court in *City of Louisville v. Milligan*, 798 S.W.2d 454, 458 (Ky. 1990), held that, "[t]he standard of judicial review of administrative decisions in disciplinary actions against police officers[,]" is the " 'clearly erroneous' rule[.]" (citing *Stallins v. City of Madisonville*, 707 S.W.2d 349 (Ky. App. 1986)). When "reviewing the decision of the administrative agency, [the reviewing court], may not substitute its view of the penalty or discipline assessed by the agency." *Milligan*, 798 S.W.2d at 458. "In weighing the substantiality of the evidence supporting an agency's decision, a reviewing court must hold fast to the guiding principle that the trier of fact is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses appearing before it." *Bowling v. Natural Resources and Environmental Protection Cabinet*, 891 S.W.2d 406, 409-10 (Ky. App. 1994) (citation omitted). Further, even though "a reviewing court may arrive at a different conclusion than the trier of fact in its consideration of the evidence in the record, this does not necessarily deprive the agency's decision of support by substantial evidence." *Bowling*, 891 S.W.2d at 410 (citation omitted).

The Kentucky Supreme Court correctly determined that the court of appeals erroneously re-weighed the credibility of the witnesses. In this case, there were two separate and independent trials regarding whether Martin actually engaged in the underlying act of oral sexual gratification while on duty: the criminal trial and the

administrative Trial Board. While it is true that the criminal conviction was subsequently overturned based upon the subsequent decriminalization of the sodomy statute, a jury nevertheless heard the evidence, observed the demeanor of the witnesses, (including Martin), and found beyond a reasonable doubt that the underlying act of oral sexual gratification while Martin was on duty had occurred.

Further, the Trial Board heard the evidence, observed the demeanor of the witnesses, (including Martin), and found by a preponderance of the evidence that the underlying act of oral sexual gratification while on duty had occurred and that Martin subsequently lied repeatedly about its occurrence.[2] Both fact-finding bodies actually

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[2] The Respondent has made claims that as the administrative Trial Board proceeding was conducted first, he could not admit the underlying act because to do so would have been "the very basis of criminal culpability" and as such would violate his rights to due process. This claim is absolutely without merit. In *Buckner v. City of Highland Park*, 901 F.2d 491 (6th Cir. 1990), a discharged police officer also made this same contention in support of his refusal to testify before the administrative body. The Sixth Circuit specifically rejected this argument citing the decision of the United States Supreme Court in *Garrity v. New Jersey*, 385 U.S. 493, 87 S.Ct. 616 (1967), which held that a confession during such an administrative proceeding could not be used against the defendant in a subsequent criminal proceeding. Consequently, if the Respondent had finally told the truth to the Trial Board regarding the fact that he had indeed engaged in the act of oral sexual gratification while on duty in his state police cruiser such an admission would have been inadmissible during the criminal proceedings. Thus, the Respondent's implications that there was some sort of sinister master plan so that any admissions

observed the demeanor of all the witnesses and determined that Mrs. Ray's testimony regarding her observance of the act of oral sexual gratification was indeed credible while Martin was not. "Regardless of the fact that this Court [the Kentucky Supreme Court] might have reached a contrary result if it were hearing this case *de novo*, it is required on the basis of its posture as a reviewing body to affirm the administrative determination. For it must be borne in mind that it is the exclusive province of the administrative trier of fact to pass upon the credibility of witnesses, and the weight of the evidence." *Id.*

"To put it simply, 'the trier of fact in an administrative agency may consider all of the evidence and choose the evidence that he believes.' " *Id.* (citation omitted). Here, the Trial Board heard all of the evidence, including the testimony of Mrs. Ray, Martin, Mr. Branham, etc., and it chose to believe the more than substantial evidence that Martin was dishonest throughout the investigation and during his testimony to the Trial Board.[3] As properly

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made to the Trial Board could be used against the respondent in the subsequent criminal proceedings is without foundation.

[3] Despite the repeated claims of Martin otherwise, Mrs. Ray was very clear as to what she witnessed. She testified repeatedly that she observed a Kentucky State Police uniformed officer, (Martin), slumped down in the seat of his State Police cruiser with his uniform pants down around his knees while she also observed another man (Branham), lying across the front seat with his head, face down, at Martin's genitals. (TBT, Vol. II, p. 5). While Mrs. Ray did not actually observe the specific conduct of oral sexual intercourse, she was "very clear . . . very confident. It was a sexual act." (TBT, Vol. II, p. 96). Mrs. Ray's testimony combined with corroborating testimony of Mr. Ray, Edward Taylor, Jr., a forensic serologist (who found prostatic acid

determined by the Kentucky Supreme Court, under applicable Kentucky law, the court of appeals erroneously substituted its evaluation of the testimony for that of the appropriate fact finding body, *i.e.*, the Trial Board who actually heard the evidence and observed the witnesses.

II. WHETHER THERE IS NO REASON TO GRANT CERTIORARI AS THIS COURT'S RULING IN *LaCHANCE V. ERICKSON*, 118 S.Ct. 753 (1998) IS CONTROLLING.

"The core of due process is the right to notice and a meaningful opportunity to be heard." *LaChance v. Erickson*, 118 S.Ct. 753, 756 (1998) (citing *Cleveland Bd. Of Ed. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 1493, 84 L.Ed.2d 494 (1985)). Here, pursuant to the requirements set forth in Kentucky Revised Statutes 16.140 and 16.150, prior to his termination, Martin was given notice of the

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phosphates, a constituent of semen, in the front seat of Martin's state police cruiser), and the conflicting testimony of Tim Branham and the prior inconsistent statements of Tim Branham's wife were more than substantial circumstantial evidence that Martin was engaged in such conduct while on duty. Further, Martin would have this Court believe that such circumstantial evidence is insufficient simply because Mrs. Ray did not actually observe the specific conduct of oral sexual intercourse, *i.e.*, she did not see the exact location of Martin's genitals. However, one must wonder, given the positions of Martin and Mr. Branham as well as Martin's state of undress, what other logical conclusion could possibly be reached. This claim must be rejected because, as this Court is well aware, a basic precept of our judicial system is that circumstantial evidence is sufficient to prove a criminal charge as well as an administrative one.

charges against him. He was then afforded an administrative, public hearing before a Trial Board. Martin was afforded the opportunity to challenge the membership of the Trial Board. He was represented by counsel throughout the proceedings. Martin was then provided a hearing which lasted several days during which he thoroughly cross examined all witnesses against him and presented witnesses on his own behalf. Following the Trial Board's determination that Martin was guilty of Dishonesty and should be terminated, he exercised his rights to appeal under Kentucky Revised Statute 16.150.[4] Simply because Martin's appeal was ultimately unsuccessful does not render the proceedings in violation of his rights to due process. As discussed more fully above, Martin argues that he cannot be found in violation of the standard of conduct prohibiting dishonesty and terminated therefor, if the underlying conduct was noncriminal. Martin further argues that to terminate him for such dishonesty is in violation of his rights to due process. However, "a 'meaningful opportunity to be heard' [does not] include . . . a right to make false statements with respect to the charged conduct." *LaChance*, 118 S.Ct. at 756. "[A] government agency may take adverse action against an employee because the employee made false statements in response to an underlying charge of misconduct." *LaChance*, 118 S.Ct. at 757. As this Court's decision in

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[4] Despite Martin's inferences of racial animus in the administrative proceedings, the record is void of any evidence to support same.

LaChance is dispositive of the issues in this case, certiorari is unnecessary here and the petition should be denied.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court of Kentucky

97-SC-116-DG
(97-CA-1628)

KENTUCKY STATE POLICE, ET AL.

APPELLANT

V.

APPEAL FROM FRANKLIN CIRCUIT COURT
HON. ROGER CRITTENDEN, JUDGE
NO. 91-CI-91

JEROME MARTIN

APPELLEE

ORDER DENYING PETITION FOR REHEARING

The Petition for Rehearing of this Court's opinion rendered March 19, 1998, filed by appellee Jerome Martin, is hereby denied.

Stephens, C.J., Cooper, Graves, Johnstone, Lambert and Wintersheimer, JJ. concur. Stumbo, J., not sitting.

ENTERED: June 18, 1998.

/s/ Robert F. Stephens
Chief Justice

RENDERED: March 19, 1998
NOT TO BE PUBLISHED

Supreme Court of Kentucky
97-SC-116-DG
(95-CA-1628)

KENTUCKY STATE POLICE, ET AL.

MOVANTS

APPEAL FROM THE FRANKLIN CIRCUIT COURT
V. HON. ROGER CRITTENDEN, JUDGE
NO. 91-CI-91

JEROME MARTIN

RESPONDENT

MEMORANDUM OPINION OF THE COURT

REVERSING

This case involves a disciplinary proceeding against a Kentucky State Police officer. He was accused of engaging in a homosexual sex act, while he was in his cruiser and while he was on duty. This act occurred prior to this Court ruling that the sodomy statute was unconstitutional, in *Commonwealth v. Wasson*, Ky., 842 S.W.2d 487 (1993).

A disciplinary proceeding was initiated against the trooper on two separate grounds. The first was for nonconformance with the law, for violating the sodomy statute. The second was for dishonesty, for being untruthful with investigators and his superiors during the investigation of the allegations.

A Kentucky State Police Trial Board was convened to hear these charges, pursuant to KRS 16.140(8). After an

evidentiary hearing was conducted, the Trial Board determined that the officer should be dismissed, on both charges. An appeal was taken to the Franklin Circuit Court, pursuant to KRS 16.150. That court affirmed the ruling, on both charges.

While an appeal was pending in the Court of Appeals, this Court rendered the opinion in *Commonwealth v. Wasson, supra*. As a result, the Court of Appeals remanded the case to the Franklin Circuit Court for further proceedings, in light of that opinion.

On remand, the Franklin Circuit judge held that the charge for non-conformance with the law could no longer stand. This was because the statute prohibiting the alleged activity had been found unconstitutional. However, the Franklin Circuit judge found that the charge of dishonesty was still viable, and that there was substantial evidence within the record to support it. Thus, he again affirmed the Trial Board's dismissal of the officer.

The trooper appealed again. A split panel of the Court of Appeals reversed.

First, the majority stated that the Trial Board had acted in excess of its powers. The majority stated that the charge of dishonesty was so intertwined with the allegation of sodomy, that the two could not truly be separated. Since sodomy was no longer illegal, the majority reasoned that the Trial Board was attempting to use the charge of dishonesty to circuitously accomplish that which it could not do directly, i.e., discharge the trooper for an alleged violation of the law. Because the Board acted in excess of its powers, the ruling was to be overturned. KRS 16.150(4)(a).

In addition, the majority stated that the Trial Board's ruling was not supported by substantial evidence. The majority stated that the key eyewitness's testimony was replete with contradictions, inaccuracies and inconsistencies. This person "assumed" that the two men were involved in an act of sodomy. However, she testified that she never really saw the conduct directly.

One of the panel members dissented. He felt that the charge of dishonesty (for lying about the commission of the underlying conduct) was supported by substantial evidence.

After a review of the record, we agree with the dissent.

The facts were developed before the Trial Board as follows.

On the Sunday of Memorial Day weekend in 1990, a 59-year-old man and his 61-year-old wife decided to visit the grave of the man's parents. The cemetery was in a very secluded area of Pike County. The road approaching the cemetery was one lane, up a steep hill and unpaved. There was a "switchback" in the road, so that cars could either turn around or allow other vehicles to pass. The switchback was approximately 40 feet down the hillside from a one-lane dirt road into the cemetery.

When the couple drove into the cemetery, they came up behind a parked State Police cruiser. The cruiser appeared to be unoccupied. The husband decided that he did not want to block the cruiser, in the event that the driver needed to leave while the couple were visiting the grave sites. Thus, he decided to park the car back down

the hillside in the switchback. He let his wife out of the car, so that she would not have to walk back up the hill.

While the husband was parking the car, the wife walked up along the side of the cruiser. She stated that when she got even with the passenger door, she looked into the car. She stated that she saw two men in the front seat. One was a black man. He was in the driver's seat and in a state trooper's uniform. She stated that the trooper's trousers were down around his knees. She stated that she saw the other man, with his head face down on the trooper's lap. She immediately turned around and walked back towards where her husband had parked the car.

Her husband testified that as he was walking towards his wife, he saw two heads pop up in the front seat of the cruiser. The cruiser's engine was started and it was driven to the top of the hill.

The wife kept walking towards her husband and their car. The husband and wife got back into their car and drove into the cemetery. They placed flowers on the graves.

When the husband and wife left the cemetery, they went to turn around in an area which had recently been graded for the building of a house. The police cruiser was there. The husband and wife then recognized the man who was in the company of the state trooper.

The woman had a son who was a state trooper. Two days later, she told her son about the incident. He reported it to the commanding authorities at the Pikeville post. They initiated an investigation.

The facts reveal that the trooper was sent to this area, in order to investigate a burglary. The man in the car was the victim of the burglary.

Both the trooper and the burglary victim denied that a homosexual encounter had taken place.

The State Police officer who investigated the case stated that he discovered a number of inconsistencies which concerned him.

First, he noted that the trooper's description of his travels of the day did not match up with a State Police report of the trooper's movements. The report was prepared by post radio dispatchers, contemporaneous with communications with officers. Officers are to report their locations and their activities.

The dispatcher's report did not mesh with the trooper's description of his activities. The trooper's description placed him 45 minutes away from the burglary scene, when he received the call to investigate it. The dispatcher's log did not verify that. According to the log, the trooper should have been much closer.

Further, the trooper stated that he was performing a "road check" at the time. It is something akin to a road block.

If true, this was a violation of State Police procedures. Officers are to obtain prior approval, before conducting road checks. Further, they are not supposed to conduct them without having other officers present.

Still further, the trooper failed to call in, once he arrived at the burglary scene. This was a violation of procedure. In fact, he called in over an hour later and

asked the radio dispatcher to back up the time to when the trooper said he first arrived, not the time when he called in.

The next discrepancy (which concerned the investigating officer) was with how the trooper and the burglary victim actually came to be in each other's presence on that day. According to the trooper, he pulled up the hill, in order to find a secluded place to urinate. The investigating officer took note of the fact that the trooper had to drive past two places with public restrooms. In any event, the trooper stated that after he finished urinating and was walking back to his car, he saw the victim walking up the hill towards him. According to the trooper, that was when he first met this man.

This was different from the story told by the victim. According to the investigator, the victim stated that he was out on the hillside looking for clues, when a State Police car came rolling past him. The officer stopped and spoke to him after rolling down the window, without leaving the car. According to the victim, the trooper was sent to the hillside by the victim's wife, after the trooper first stopped by the victim's home.

This story was *not* verified by the victim's wife. She stated that the first time she saw the trooper on that day was after the trooper and her husband had already looked over the hillside.

The investigating officer was also concerned with the fact that the trooper said he had just met the burglary victim on the day of the investigation. However, when the investigator first met with the burglary victim, the investigator stated that the victim said that he had known

the trooper for some months and had met him on several occasions.

The investigator was also concerned that the trooper had failed to pass, when he took a polygraph test. The investigator also pointed out that the burglary victim initially agreed to take a polygraph test. However, when he was contacted to make specific arrangements, the burglary victim declined to take the test.

Four months after these allegations were made, a State Police serologist conducted a chemical test on the seat of the police cruiser. It rendered a positive result for a substance found in semen. The positive test was on a small spot directly underneath the steering wheel.

All of this testimony was put before the State Police Trial Board.

Before the Trial Board, the defense went to great lengths to point out perceived inconsistencies in the eyewitness's testimony. She apparently had changed her estimate of the distances from the switchback to the cemetery road, from 20 feet to 40 feet to 50 feet. She also testified that the hair color of the man in the car with the trooper was brown. However, the burglary victim's hair was gray. Much time and effort was also spent on perceived inconsistencies between her initial statement, statements made during a polygraph examination and her testimony before the Trial Board.

It appears that at the polygraph, the eyewitness stated that she never really saw the conduct directly, and that she only "assumed" that the two men were involved

in an act of sodomy. The defense saw this as being equivocal.

At the hearing before the Trial Board, the investigating officer stated that he believed that the eyewitness was operating under some confusion, at the polygraph examination. He thought that she believed that she had to actually see the trooper's genitals in the other man's mouth, in order to state positively that she had seen an act of sodomy. She was nervous in the extreme, to the point of being hostile and uncooperative at the polygraph exam. However, she did not ever equivocate that she saw that the trooper's pants were down and that the other man's face was in the trooper's lap.

The defense also attempted to discount the eyewitness testimony, on the basis of racial animus. A loved one of hers (her second husband) had been shot and killed by a black man who was in the course of committing a crime. The defendant trooper was the only black officer assigned to the Pikeville post, at the time.

The tenor of the trooper's defense throughout this case was that the trooper was the victim of a witch hunt. It was argued that the charges were initiated by State Police authorities, not the eyewitness. (Apparently she declined to sign the initiating complaint.) The defense maintained that the investigation was biased, to the point of misrepresenting the facts of the case. Further, it was argued that the result was tainted by the process, i.e., the State Police were complainant, investigator, prosecutor, judge and jury.

We are compelled to affirm the Trial Board's ruling.

The simple fact is that the Kentucky State Police Trial Board has been given the role of serving as the finder of fact in disciplinary hearings of this nature. KRS 16.140. The Trial Board is invested with the exclusive jurisdiction of discipline and removal of State Police officers. *Hughes v. Welch,* Ky.App., 664 S.W.2d 205 (1984). Trial Board tribunals are administrative hearings. The Board's actions are subject only to strict review on appeal, pursuant to KRS 16.150(4). *Hughes, supra,* p. 108.

There were conflicting facts put before the Trial Board. The Board had the lawful task of deciding which sets of witnesses to believe. It was within the scope of the Trial Board's authority to believe the testimony put forth by the eyewitness and her husband, when coupled with the results of the chemical test of the cruiser and the inconsistencies discovered by the investigator. The Board's ruling was based on evidence placed before it. As a result, that ruling is not to be disturbed on appellate review.

There is no question that the record also contained sufficient evidence which would have supported the Trial Board's ruling the other way. It would only lengthen this opinion, to discuss those points of evidence in detail. It is sufficient to state that counsel for the trooper developed these arguments very thoroughly.

However, the Trial Board was persuaded by the opposing evidence. Just as the issue was honest/dishonesty in *Hughes v. Welch, supra,* the Trial Board had sufficient evidence before it to rule as it did.

The Court of Appeals opinion is reversed. The ruling of the Franklin Circuit Court is reinstated, in which the Trial Board's order of dismissal was affirmed.

Stephens, C.J., Cooper, Graves, Johnstone, Lambert and Wintersheimer, JJ., concur.

Stumbo, J., not sitting.

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Commonwealth Of Kentucky

Court Of Appeals

NO. 95-CA-1628-MR

JEROME MARTIN

APPELLANT

APPEAL FROM FRANKLIN CIRCUIT COURT
v. HONORABLE ROGER CRITTENDEN, JUDGE
ACTION NO. 91-CI-0091

KENTUCKY STATE POLICE, ET AL.

APPELLEE

ORDER DENYING PETITION FOR REHEARING

* * *

BEFORE: COMBS, GARDNER, and MILLER, Judges.

The Court having considered the Petition for Rehearing and being sufficiently advised, it is **ORDERED** that the same is hereby **DENIED.**

/s/ John D. Miller
JUDGE, COURT OF APPEALS

ENTERED: JAN 24 1997

RENDERED December 13, 1996; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

No. 95-CA-1628-MR

JEROME MARTIN

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER CRITTENDEN, JUDGE
ACTION NO. 91-CI-0091

KENTUCKY STATE POLICE, KENTUCKY STATE POLICE COMMISSIONER, CAPTAIN JOHN WITT, CAPTAIN LONNIE MOERT, LT. JERRY HELM, TROOPER STANLEY JONES, TROOPER JOE M. ALLEN, and TROOPER MARK COOL

APPELLEES

OPINION REVERSING

* * *

BEFORE: COMBS, GARDNER, and MILLER, Judges.

COMBS, JUDGE. Jerome Martin (Martin) appeals the Franklin Circuit Court's amended order sustaining the Kentucky State Police Trial Board's (Trial Board) decision to dismiss him for dishonesty. Martin argues on appeal that the Trial Board exceeded its authority and jurisdiction, that its findings were not supported by substantial evidence, and that its decision was arbitrary and capricious. We agree and reverse the circuit court's order.

Jerome Martin, a Kentucky State Trooper, was assigned to Kentucky State Police Post No. 9 in Pikeville, Kentucky. On May 27, 1990, Doris Ray was visiting the Pinson Cemetery, Pike County, where she said that she believed she observed Martin and a white male identified as Tim Branham allegedly engaging in oral sex in Martin's police cruiser. Mrs. Ray reported this incident to her son, Terry Thompson, also a Kentucky State Trooper. On May 29, 1990, Trooper Thompson reported his mother's allegations to his supervisors. An investigation was conducted, and Martin denied the allegation. Formal disciplinary charges were filed against Martin for: (1) nonconformance to the law (committing sodomy in the fourth degree in violation of KRS 510.100); and (2) dishonesty for lying about the commission of the underlying conduct.

On December 18, 1990, the Trial Board convened to conduct an evidentiary hearing on the matter. On January 11, 1991, the hearing was concluded, and the Trial Board found Martin guilty of both charges. He was dismissed from the Kentucky State Police. Pursuant to 16.150, Martin appealed the Trial Board's decision to the Franklin Circuit Court. On February 25, 1994, that court affirmed the Trial Board's decision. Martin then appealed the circuit court's decision to this Court. Action No. 94-CA-000616. This Court vacated and remanded the circuit court's order, citing *Commonwealth v. Wasson*, Ky., 842 S.W.2d 487 (1992), in which the Kentucky Supreme Court struck down as unconstitutional KRS 510.100, the sodomy statute under which Trooper Martin had been charged. This Court directed the circuit court to reconsider its order in light of the Supreme Court's decision. One June

15, 1995, the Franklin Circuit Court entered an amended order vacating the Trial Board's decision as to the charge of nonconformance with the law. However, the circuit court found that there was substantial evidence to support the Trial Board's decision to dismiss Martin on the charge of dishonesty; *i.e.*, that he had lied about the underlying conduct regardless of its now de-criminalized status. This second appeal followed.

Appellate review of a disciplinary action is essentially limited to the determination of whether: (1) the board acted without or in excess of its powers; (2) the order appealed from was procured by fraud; or (3) there was substantial evidence to support the order appealed from – if questions of fact are in dispute. KRS 16.150(4). Substantial evidence is defined as evidence which, when taken alone or in the light of all the evidence, has sufficient probative value to induce conviction in the minds of reasonable persons. *Bowling v. Natural Resources*, Ky. App., 891 S.W.2d 406 (1994). In the case *sub judice*, we find the Trial Board has exceeded its authority and that its decision was not supported by substantial evidence.

Pursuant to KRS 16.140(1), an officer shall not be "removed, suspended, reduced in grade or pay for any reason except inefficiency, misconduct, insubordination, or violation of law or of any rule or regulation promulgated by the commissioner." Martin's dismissal was based upon his alleged violation of KRS 510.100 *and* his resulting denial of this allegation. the coordinating, secondary charge of dishonesty arose directly from his assertion of a defense: *i.e.*, that he had not engaged in the conduct constituting sodomy. Under the unique factual scenario of this case, we find that the underlying conduct

and Martin's denial are so intertwined as not to be severable for the purpose of providing alternate grounds for his dismissal.

As noted earlier, KRS 510.010 (sodomy in the fourth degree) was declared unconstitutional in *Wasson, supra.* But for the accusation based upon that unconstitutional statute, Martin would have had no occasion to assert the defense of a denial of the alleged conduct. We hold that any prosecution, reprisal, or disciplinary action in pursuit of, resulting from, or flowing from the primary charge of sodomy is invalid as it arises directly from an act that has been specifically decriminalized by the Kentucky Supreme Court. Any associated or tangential allegations of wrongdoing must fail accordingly. It amounts to a denial of due process to punish him for asserting a defense to conduct which is no longer punishable in and of itself. We agree with Martin's argument that the Board was attempting to accomplish circuitously that which it could not do directly. In so doing, it acted arbitrarily and beyond the scope of its legitimate jurisdiction.

We also find that a second ground exists as a basis for reversing the circuit court: the lack of substantial evidence to support the conclusions of the Trial Board. The record at the administrative level is replete with contradictions, inaccuracies, and inconsistencies with regard to the alleged incident. Mrs. Ray, Martin's sole accuser and eyewitness, could not testify clearly as to *anything* she supposedly witnessed. She "assumed" that Trooper Martin and Tim Branham were engaged in an act of sodomy even though she testified that she never really witnessed the conduct directly. Furthermore, she could not state with certainty whether she remained in her husband's car

or whether she exited it to peer inside the police cruiser. She was not certain of how she gained visual access into the police cruiser – either by standing straight or leaning to look inside. She claimed to have seen Tim Branham's head in a compromising position, but she mistakenly identified his hair color as brown rather than gray. And so the record continues, revealing a string of circumstantial evidence highly contradictory when reviewed in its totality.

Appellee's brief notes or perhaps concedes that Martin might have been more appropriately charged with "Inefficiency" and "Dishonesty." That may or may not be true. The fact remains that he was accused of sodomy and that the Kentucky State Police elected to proceed with an administrative inquiry prior to a trial of the criminal case. KSP cannot now argue that a different charge may have been more appropriate. There is no doubt that every state trooper has an obligation, indeed a sacred duty, to conduct himself professionally at all times and to remain constantly prepared to assist his fellow officers while on duty. This opinion in no way condones or vindicates dereliction of duty by a police officer. It is, rather, a reminder that – no matter how repugnant the conduct alleged – the KSP administrative tribunal has an obligation to adhere to fundamental due process.

For the foregoing reasons, we reverse the amended order of Franklin Circuit Court.

MILLER, JUDGE, CONCURS.

GARDNER, JUDGE, DISSENTS AND FILES A SEPARATE OPINION. GARDNER, JUDGE, DISSENTING: I respectfully dissent. The charge of *dishonesty* is a Class A

violation. The Trial Board found that Martin lied during the investigation about his underlying conduct, i.e., oral sexual gratification while on duty, in uniform, within the confines of a Kentucky State Police cruiser. It is of little solace to Martin that his conduct was licit or illicit. The majority, I believe, perceives some fundamental unfairness in the timing of the criminal investigation and overlapping internal administrative process.

The administrative charge of dishonesty is separate and distinct from the criminal charge. While it is certainly true that Martin could have cooperated truthfully and faces both criminal prosecution and termination of his employment, his untruthful answers, but for *Wasson, supra,* have led to the same result.

The Kentucky State Police per its policy and procedure manual has a duty to ensure that officers are " . . . *at all times* honest and truthful." Kentucky State Police Policy & Procedure Manual. (emphasis added). Martin's participation in the investigation has impaired the basic functions entrusted by law to the Kentucky State Police.

The charge of dishonesty for lying about the commission of the underlying conduct is supported by substantial evidence, and I would affirm the Franklin Circuit Court's amended order.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEES:
Earl C. Mullins, Jr. Louisville, KY	Kathryn Walton Frankfort, KY

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
CIVIL ACTION NO. 91-CI-00091
DIVISION 1

JEROME MARTIN **PLAINTIFF**

VS. **AMENDED ORDER**

KENTUCKY STATE POLICE, et al. **DEFENDANT**

* * *

This matter is before this Court upon Remand from the Kentucky Court of Appeals (94-CA-0616-MR), directing this Court to reconsider this Court's decision of February 25, 1994, sustaining the Trial-Board's Order in light of the decision reached by the Kentucky Supreme Court in *Commonwealth v. Wasson,* Ky., 842 S.W.2d 487 (1993).

Pursuant to the directions of the Court both parties to this action have filed briefs on Remand and the Court is fully advised.

It is the Opinion of this Court that the Petitioner was charged with violating a Criminal Statute of the Commonwealth of Kentucky, not with non-conformance to duty, and since that statute has now been declared unconstitutional in *Commonwealth v. Wasson,* the conviction by the trial board cannot be used as a basis for dismissal by the trial board.

It is also the Opinion of this Court that there was substantial evidence in the record to support the trial-board in its decision to dismiss the Petitioner for dishonesty. As there is substantial evidence in the record to support the trial board's actions concerning Count II of

the charges, it is the **ORDER** of this Court that decision of the trial board as to Count *II* of the charge is **SUSTAINED.** The decision of the trial board as to Count 1 is **Vacated.**

There being no just cause for delay, this is a final and appealable order.

SO ORDERED this 15th day of June, 1995.

/s/ Roger L. Crittenden
ROGER L. CRITTENDEN
JUDGE, FRANKLIN CIRCUIT COURT

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RENDERED: MARCH 24, 1995; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

No. 94-CA-0616-MR

JEROME MARTIN

APPELLANT

APPEAL FROM FRANKLIN CIRCUIT COURT
v. HONORABLE ROGER CRITTENDEN, JUDGE
ACTION NO. 91-CI-91

KENTUCKY STATE POLICE;
KENTUCKY STATE POLICE COMMISSIONER;
CAPTAIN JOHN WITT; CAPTAIN LONNIE MOERT; LIEUTENANT JERRY HELM;
TROOPER STANLEY JONES;
TROOPER JOE M. ALLEN; and
TROOPER MARK COOL

APPELLEES

OPINION

VACATING AND REMANDING WITH DIRECTIONS

* * *

BEFORE: LESTER, CHIEF JUDGE; HOWERTON and MILLER, Judges.

MILLER, JUDGE: Jerome Martin brings this appeal from a February 25, 1994, order of the Franklin Circuit Court. We vacate and remand with directions.

On January 11, 1991, the Kentucky State Police Trial Board (the Board) found appellant, an officer of the Kentucky State Police force, guilty of disobeying the law and of lying by denying same. Specifically, he was found guilty of engaging in the act of oral sex with another man on May 27, 1990, in violation of the criminal offense of fourth-degree sodomy (Ky. Rev. Stat. (KRS) 510.100), and was accordingly terminated from the force. He appealed to the Franklin Circuit Court. On February 25, 1994, the circuit court sustained the Board's order. This appeal follows.

In *Commonwealth v. Wasson*, Ky., 842 S.W.2d 487 (1993), the Supreme Court of Kentucky held KRS 510.100 unconstitutional in relation to criminalizing homosexual conduct. We believe it appropriate that the circuit court reconsider its order in light of *Wasson*.

For the foregoing reasons, the order of the circuit court is vacated, and this cause is remanded for proceedings consistent with this opinion.

ALL CONCUR.

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ATTORNEYS FOR APPELLEES:

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COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 91-CI-00091

JEROME MARTIN — APPELLANT

ORDER

V.

KENTUCKY STATE POLICE, et al. — APPELLEE

I. STATEMENT OF THE CASE

This action comes before the Court on Appellant, Jerome Martin's, Appeal of a verdict of the Appellee, the Kentucky State Police Trial Board ("the Board") finding the Appellant guilty of Violating the Law and of Dishonesty and setting his punishment as dismissal from the Kentucky State Police ("KSP").

Martin appeals the verdict on the grounds that the Board exceeded its authority and jurisdiction in this matter, the Board was improperly instructed as to the standard of proof required to return a verdict of guilty, and the verdict was not supported by substantial evidence. Martin requests that this Court dismiss the charges against him and order his immediate reinstatement to the KSP.

The Board maintains that it acted within its authority and jurisdiction, it applied the proper standard of proof, and its verdict was supported by substantial evidence. For these reasons, the Board requests that its verdict be sustained.

II. FINDINGS OF FACT

1. Jerome Martin began working for the KSP in September, 1988. Martin was assigned to the Pikeville Post after spending five months at the State Police Academy. Martin was the only black trooper serving at that Post at that time.

2. On May 29, 1990, Doris Ray informed her son, KSP Trooper Terry Thompson, that she had observed a black trooper and an individual named Tim Branham engaged in an act of oral sex in a KSP car at the Pinson Cemetery in Meta, Kentucky on May 27, 1990.

3. Trooper Thompson reported this information through the KSP chain of command and an investigation ensued. Martin was suspended with full pay and benefits while the investigation was underway.

4. On November 19, 1990, administrative charges of Violation of Law and Dishonesty were filed against Martin and he was suspended from duty without pay.

5. On December 18, 1990, a KSP trial board proceeding was convened to hear the matter.

6. Jerome Martin testified as to the events in Meta on May 27. He claimed that he was responding to a burglary complaint in the area and encountered Tim Branham, the complainant, on the dirt road leading to the cemetery. According to Martin, the two men got into Martin's cruiser so Martin could fill out a case report. A small blue station wagon drove up behind them on the narrow road. Martin drove the cruiser to the end of the road to turn the car around. Both men then got out of the cruiser and looked through the brush for stolen items.

After approximately ten minutes, the blue car had turned around and was departing the area. While Branham was still in his cruiser, Martin followed the car out of the area.

7. Doris Ray testified as to her version of the same incident. She stated that on May 27, 1990, she and her husband, John Ray, drove to the cemetery to leave flowers at a grave. They drove up behind a State Police car bearing the number 408 but did not see anyone inside it. Because of the narrowness of the road, Mr. Ray could not pass the car. He let his wife out of the car and backed down the road. Doris Ray peered into the cruiser. She described what she saw as follows:

> So, I walked up on the passenger's side and looked in. Trooper Martin had his pants down. And the other guy in the car had his head over between his legs, face down.

(Transcript, Vol. II, pp. 5-6.)

Doris Ray said that after observing this, she walked to the back of the car and her husband walked toward her from his car. At that point, according to Mrs. Ray, "the heads popped up in the front seat and the car pulled out real fast and spinned." (Transcript, Vol. II, page 6.) Mr. Ray drove on, past the cruiser, which was pulled off on a graded area. Doris Ray saw Mr. Branham standing by the cruiser but did not see Trooper Martin because she was "embarrassed and I was looking the other way." (Transcript, Vol. II, page 6.)

8. John Ray, Doris Ray's Husband, testified about the May 27th incident. He stated that when he and his wife drove by the cruiser he observed Trooper Martin "fixing" his pants or belt. (Transcript, Vol. II, p. 110.)

9. Edward Taylor, Jr., a forensic serologist with the KSP, testified that he conducted a semen analysis on KSP cruiser number 408 on September 21 and 22, 1990. He said that he identified a stain on the front seat of the cruiser, just under the steering wheel, that consisted of acid phosphatase, a component of semen. On cross examination, Taylor said it was not possible to determine whether the stain in the car related to the events of May 27, 1990, and, given the small size of the sample, it was impossible to determine the blood type.

10. Troopers Gary Martin and Jerome Root both testified that cruiser number 408 had been assigned to them before it was assigned to Jerome Martin. In Gary Martin's case, the car had been assigned to him for almost three years. Both men denied conducting sexual activity in the car or knowing of such activity being conducted in the car while it was assigned to them. Both men admitted that the car had been taken for servicing numerous times while the car was assigned to them. Gary Martin also testified that cruisers were taken to private garages for servicing and normally were left with the garage for several hours or overnight for that purpose. Gary Martin stated that other troopers may have used the car while it was assigned to him although he could not remember any instances of this.

9. Lieutenant Ed Shemelya testified about his investigation into the events of May 27. He testified that on May 30, he interviewed Doris Ray, viewed the scene, and photographed it. He also interviewed Tim Branham.

10. Shemelya testified that Trooper Martin was brought to the Post on May 30 and told of the allegation

against him. Shemelya said that Martin denied the incident but indicated that Martin's response was unusual under the circumstances. "I was expecting that he would vehemently deny the allegation and he didn't do that. It was almost off the cuff. . . . (Transcript, Vol. III, p. 55.)

11. Shemelya testified that on May 31, he interviewed Tim Branham's wife. Shemelya described inconsistencies between Mrs. Branham's statement and that of her husband. Shemelya also recontacted Doris Ray who denied harboring any sentiments against Tim Branham and denied knowing Jerome Martin.

12. Shemelya testified that a polygraph examination was administered to Doris Ray on June 7, 1990, and that the examiner informed Shemelya that the results of this test would be inconclusive because Mrs. Ray was nervous and hostile. (Transcript, Vol. III, p. 63.)

13. Lieutenant Shemelya pointed out several instances where the statement Jerome Martin gave in response to the accusations against him conflicted with time records routinely kept by the KSP. According to Shemelya, the KSP 209 constitutes a record of a trooper's activities for a given day, including the time the trooper receives, arrives at, and leaves a call. Shemelya testified that there were multiple inconsistencies between Jerome Martin's KSP 209 for May 27, 1990, and the statement he gave the KSP in response to the charges against him. These inconsistencies include Martin's location when he received the burglary call to Tim Branham's and whether Martin was conducting a road check when he received the call. (Transcript, Vol. III, pp. 63-74.)

On cross examination, Shemelya admitted that it was the dispatcher's responsibility, not the trooper's, to log in times and locations on the KSP 209 after the trooper called in to report his location. (Transcript, Vol. IV, p. 19.).

14. Tim Branham testified about the events of May 27th. His depiction of the incident was similar to that of Jerome Martin. Branham denied that any sexual activity took place between he and Martin.

15. After the evidence was taken, the Board was given the following instructions:

> Instruction No. 1, Section AME-1 of the Kentucky State Police Manual, provides in relevant part that all officers, whether on or off duty, shall obey all laws of the United States and of any state or local jurisdiction in which the officers are present. . . . [T]he fact that no . . . [criminal] prosecution is initiated shall not preclude the Department from taking disciplinary action for a violation of this standard. . . .
>
> Trooper Martin is charged with having committed the offense of Sodomy in the Fourth Degree. . . .
>
> Instruction No. 2, Section AME-1 of the Kentucky State Police Manual provides in relevant part that officers shall at all times be honest and truthful in dealing with fellow officers or members of the public in any written or oral communication. Upon order of the Commissioner, the Commissioner's designee or their Commanding Officer, officers must answer and answer truthfully all questions specifically directed and narrowly related to the scope of employment and operations of the Kentucky State Police, which may be asked of them.

> Dishonesty is a class A violation. . . . Trooper Martin is charged with Dishonesty as the result of his failure to respond truthfully to questions from his commanding officers and from fellow officers in both written and oral communication, concerning the charges as set forth in Instruction No. 1 above. . . .
>
> Instruction No. 3, the Kentucky State Police bear the proof of burden [sic] on both charges brought against Trooper Jerome Martin. This burden of proof requires that the Department prove each charge by a preponderance of the evidence, which could mean that the evidence is sufficient on its face to mean what it says, which means that the evidence presented by the Department must outweigh the evidence presented by the Defendant. Only evidence presented at this hearing can be used to satisfy this burden.

(Transcript, Vol. VII, pp. 81-83.)

16. In his closing argument, Martin's counsel maintained that the case against Martin was a swearing contest hinging upon whether the Board believed Jerome Martin and Tim Branham or Doris and John Ray. He also suggested that racial prejudice was an issue in the case. As he put it, the Board "must choose between the White, grandmotherly Doris Ray or the testimony of the reputed homosexual and the Black trooper." (Transcript, Vol. VII, p. 92.) Martin's counsel characterized the charges against Martin as follows: "It's a story that very simply got out of hand when a Black, efficient State Police Officer was sitting in a car with a man, who evidently in this community has a reputation for being a homosexual." (Transcript, Vol. VII, p. 106.)

17. In his closing argument, the counsel for the KSP pointed out discrepancies in Trooper Martin's testimony and stated that Martin's conspiracy theory" was "absolutely, positively unbelievable." (Transcript, Vol. VII, p. 126.) He denied that racial prejudice was an issue in the case.

18. On January 11, 1991, the Board issued two unanimous verdicts finding Jerome Martin guilty of violating the law and of dishonesty and fixed his punishment at dismissal from the Kentucky State Police.

19. On January 22, 1991, Martin filed this Appeal.

III. CONCLUSIONS OF LAW

A. THE KENTUCKY STATE POLICE TRIAL BOARD DID NOT EXCEED ITS AUTHORITY AND JURISDICTION IN THIS MATTER.

Martin claims that the Board tried him for committing the crime of sodomy and that a criminal trial is not within the Board's jurisdiction. Contrary to Martin's claim, the preceding in question was not a criminal trial but an administrative hearing. Martin was charged with two violations of the Kentucky State Police Standards of Conduct, Section AME-1. These charges were administrative, not criminal.

KRS 16.140(8) establishes a trial board for the Kentucky State Police "[f]or the purpose of hearing charges against any officer. . . . " This statute "endowed the trial board of the . . . State Police with the exclusive jurisdiction of discipline and removal of officers . . . subject only to strict review on appeal by KRS 16.150(4)." *Hughes v.*

Welch, Ky.App., 664 S.W.2d 205, 208 (1984). KRS 16.140(8) clearly gives the Board jurisdiction over the KSP's case against Jerome Martin.

B. THE TRIAL BOARD WAS PROPERLY INSTRUCTED AS TO THE CORRECT STANDARD OF PROOF TO APPLY IN THIS MATTER.

Instruction No. 3 required the board to apply a preponderance of the evidence standard to the Martin case. The Appellant claims that this instruction violated his constitutional rights because, to be convicted of a crime, the case against the defendant must be proven beyond a reasonable doubt.

Martin is correct in asserting that a criminal conviction requires that a defendant's guilt be proven beyond a reasonable doubt but that principle is not relevant in this action. The preceding before the Board was an administrative, not criminal, preceding. An administrative determination of whether an individual has violated the law does not require proof beyond a reasonable doubt. *Louisville Civil Service Bd. v. Blair*, Ky., 711 S.W.2d 181, 183 (1986).

C. THE TRIAL BOARD'S DECISION IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

KRS 16.150(4) establishes the standard of review this Court must apply in reviewing decisions of the Board. The statute provides that:

> (4). . . . [The Court's] review shall be limited to determining . . .
>
> . . . .
>
> (c) If questions of fact are in issue, whether or not any substantial evidence supports the order appealed from.

This strict standard of review is upheld in *Hughes v. Welch*, Ky.App., 664 S.W.2d 205 (1981). If there is substantial evidence in the record to support the agency's decision, this Court must uphold it "even though there may be conflicting evidence in the record." *Kentucky Comn on Human Rights v. Fraser*, Ky., 625 S.W.2d 852, 856 (1981). The test of substantiality of evidence is whether . . . it has sufficient probative value to induce conviction in the minds of reasonable men." *Kentucky State Racing Commission v. Fuller*, Ky., 484 S.W.2d 298, 308 (1972). The trier of fact in an administrative preceding has considerable latitude to evaluate evidence and assess the credibility of witnesses and may "choose the evidence that . . . [it] believes." *Com. Transp. Cabinet v. Cornell*, Ky.App., 796 S.W.2d 591, 594 (1990).

Jerome Martin had the opportunity to present evidence regarding inconsistencies in the testimony of witnesses against him and their alleged biases. The Board heard Martin's evidence and found him guilty on both counts. It is true that conflicting evidence was presented at the hearing but the presence of conflicting evidence does not provide this Court with a basis for overturning the Board's verdict, as long as there is substantial evidence to support that verdict.

The testimony of the Rays provides substantial evidence to support the Board's decision that Martin was guilty of committing sodomy. Doris Ray gave eyewitness testimony of a purported criminal act taking place in a State Police cruiser. John Ray's testimony supported her version of events.

Martin suggests racial prejudice and personal animosity as motivations for Doris Ray's testimony. These are important considerations but the law does not permit this Court to determine whether they are valid in this case. The law requires the *trier of fact* to assess the evidence and the credibility of witnesses. The Board heard the testimony and had the opportunity to observe the witnesses' demeanor. Consequently, the Board was in a far better position than this Court to determine whose testimony was more credible and to assess the potential biases of witnesses.

Martin, in his Memorandum, points out dozens of "discrepancies, inconsistencies and absurdities [which] utterly destroy any notion that substantial evidence was presented." (Appellant's Memorandum at 12.) For example, in regard to Doris Ray's testimony, he points out that Mrs. Ray "*assumes* that the position of the persons in the car (*i.e.*, the passenger with his head between the shoulders and lap of the driver) were for the purpose of having oral sex (Transcript, Vol. II, p. 70, question 315)." (Memorandum, p. 15.) He also points out that she did not see Jerome Martin's genitals when she observed the incident. Martin writes in his Memorandum, "Doris Ray acknowledges that to be one hundred percent sure about an act of sodomy, she would have had to see where the genitals were. . . . " (Memorandum, p. 16.)

Given the facts as Mrs. Ray relates them, her "assumption" that she observed an act of sodomy in the cruiser is reasonable. She admits that she could not be absolutely certain but maintains that she was "very confident that it was a sexual act." (Transcript, Vol. II, p. 96.) Her reluctance to commit herself "one hundred percent" in this case does not necessarily cast doubt on her veracity. She describes what she claims she saw and the inference she drew from that. The Board was free to determine what weight to give this evidence and chose to believe Mrs. Ray.

Regarding Mrs. Ray's possible biases in this case, Martin points out that she is related to the alleged victim in an unrelated charge against Tim Branham. (Memorandum, p. 16.) Again, this information was given in evidence to the Board which was free to consider it in weighing the credibility of her testimony. Martin expresses reservations about the logistics of Mrs. Ray's actions on May 27, 1990. For example,

> Doris Ray claims that she and her husband waited five to ten . . . minutes behind the trooper's car . . . and then slammed the door as she exited the car. . . . Yet despite the noise and the Rays [sic] prolonged presence, she would have this Court believe she sees no one in the car until she walks beside the car.

(Memorandum, p. 13.)

This testimony is not necessarily inconsistent with Mrs. Ray's story.

Martin points out inconsistencies between Doris Ray's testimony before the Board and the statement she

gave on May 30, 1990, and her misidentification of a photograph of the scene. (Memorandum, pp. 13 and 15.) Martin's counsel had the opportunity to bring these issues to the attention of the Board and did so. It was up to the Board to consider the impact of these inconsistencies and the misidentification in the context of the total evidence before it.

Martin makes much of his claim that Doris Ray failed the first polygraph test administered to her. This claim is misleading. In fact, according to Lieutenant Shemelya's testimony, the examiner informed Shemelya that the results would be "inconclusive" because of Doris Ray's emotional state. (Transcript, Vol. III, p. 63.)

Martin maintains that the inconsistencies between Martin's statement and the entries on his KSP 209 for May 27th are "minor." These discrepancies relate to where Martin was and what he was doing when the Branham burglary call came in. Again it was up to the Board to give proper weight to these inconsistencies.

Doris Ray's testimony, supported by the testimony of John Ray, constitutes substantial evidence that Jerome Martin is guilty of violating the law. Lieutenant Shemelya's testimony regarding the inconsistencies between Jerome Martin's statement to him and his KSP 209 for the day and his statements concerning the incident constitute substantial evidence of dishonesty.

THEREFORE, it is the ORDER of this Court that the verdicts of the Kentucky State Police Trial Board finding Jerome Martin guilty of Violating the Law and of Dishonesty are SUSTAINED and Jerome Martin's Appeal is DISMISSED.

So Ordered this 25th day of February, 1994.

There being no just reason for delay, this is a final and appealable ORDER.

/s/ Roger L. Crittenden
ROGER L. CRITTENDEN
JUDGE, FRANKLIN
CIRCUIT COURT

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COMMONWEALTH OF KENTUCKY
DEPARTMENT OF STATE POLICE
TRIAL BOARD NO. 90-2

	VERDICT	PUNISHMENT
Charge number 1	Guilty	Dismissal
Charge number 2	Guilty	Dismissal

All members concurring are to sign below:

/s/ John E. Witt

/s/ Stan James

/s/ Mark Cool

/s/ Joe M. Allen

/s/ Jerry Helm

All members dissenting are to sign below:

_____

_____

_____

_____

_____

* * *

suspension for any length of time not to exceed six months, or by reducing the grade if the officer's classification warrants same, or by combining any two or more punishments, or by reducing the monthly salary of the officer by not more than twenty percent for not more than six months, or by removing or dismissing the officer from the service of the agency. The same number of members concurring as provided in the above paragraph shall be necessary to establish the penalty.

STANDARDS OF CONDUCT

Class A Violations

1. *Conformance To Law.* All officers, whether on or off duty, shall obey all laws of the United States and of any state or local jurisdiction in which the officers are present. A conviction for violating any law shall be prima facie evidence of a violation of this standard, but the fact that no conviction is obtained or that no prosecution is initiated, shall not preclude the department from taking disciplinary action for a violation of this standard. Violation of law is a class A violation if the law violated is a felony or a class A misdemeanor; a class B violation if the law violated is a class B misdemeanor; and a class C violation if the law violated is a violation or local ordinance.

2. *Honesty.* Officers shall at all times be honest and truthful in dealing with their fellow officers or members of the public and in any written or oral communications. Upon order of the Commissioner, the Commissioner's designee, or their commanding officer, officers must answer and answer truthfully all

questions specifically directed and narrowly related to the scope of employment and operations of the Kentucky State Police which may be asked of them. Dishonesty is a class A violation.

3. *Courage.* Officers shall carry out their duties with courage and determination and shall remain firm and steadfast in the face of opposition and danger. Cowardice is a class A violation.

4. *Use Of Force.* Officers shall use force in accordance with law and departmental policy, and shall use only that degree of force which is reasonable and necessary under the circumstances. Use of excessive force is a class C violation unless the complainant suffered serious physical injury, in which case it is a class A violation.

[Logo]
CERTIFICATION
OF COURT RECORDS

AOC-060
9-84

Commonwealth of Kentucky
Court of Justice

Case No. 91 M 123
County PIKE
Court DISTRICT

I, BETTY PRATER JUSTICE Clerk of the CIRCUIT Court, do certify that the following are true and correct copy(s) of the JURY INSTRUCTIONS AND VERDICT IN THE CASE OF COMMONWEALTH OF KENTUCKY VS: JEROME MARTIN as recorded in the Office of the Circuit Clerk of PIKE County.

In TESTIMONY WHEREOF witness my had as Clerk aforesaid, this the 16 day of APRIL, 1991.

/s/ Betty Prater Justice
Clerk

By: /s/ Sharon Ratliff D.C.

PIKE DISTRICT COURT
DIVISION NO. I

ACTION NO. 91 M 123

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS: INSTRUCTION NO. I

JEROME MARTIN DEFENDANT

* * *

You will find the Defendant, Jerome Martin, guilty if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in this county on or about May 27, 1990, and within 12 months before the issuance of the warrent for his arrest herein, he engaged in deviate sexual intercourse with Tim Branham; AND

(b) That the Defendant, Jerome Martin, and Tim Branham, are of the same sex.

If you find the Defendant, Jerome Martin, guilty you will fix his punishment at confinement in the county jail for a period not to exceed 12 months, at a fine not to exceed $500.00 or at both confinement and fine, in your discretion.

The verdict of the jury must be unanimous and signed by one of you as foreman. You may use one of the following verdict forms in writing your verdict.

VERDICT FORM

We the jury find the defendant not guilty.

_____

Foreman

VERDICT FORM

We the jury find the defendant guilty and fix his punishment at a fine of $500.00., and/or confinement in the County Jail for NO (days) (months).

/s/ Roy E. Alexander
Foreman

INSTRUCTION NO. III

"The law presumes a defendant to be innocent of a crime, and the criminal complaint (or other accusatory document) shall not be considered as evidence or as having any weight against him. You shall find the defendant not guilty unless you are satisfied from the evidence alone, and beyond a reasonable doubt, that he is guilty. If upon the whole case you have a reasonable doubt that he is guilty, you shall find him not guilty."

INSTRUCTION NO. II

* * *

"DEVIATE SEXUAL INTERCOURSE" Means any act of sexual gratification between persons not married to each other involving the sex organs of one person and the mouth or anus of another.